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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Telecommunications Act of 1996	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use of Customer Proprietary Network Information and other Customer Information	)	

REPLY OF BELL ATLANTIC[1] TO OPPOSITIONS

Introduction

Bell Atlantic and nearly a score of other petitioners have shown that the Commission's CPNI Order[2] should be revised – whether through reconsideration or forbearance – in three key respects.

First, they demonstrated that consumers could benefit by allowing telecommunications carriers to use CPNI from telecommunications services to market and sell related customer premises equipment ("CPE") or packages that include both telecommunications services and CPE. Second, they demonstrated that consumers would also benefit by permitting carriers to use CPNI to market and sell telecommunications along with information services,

[1] The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; New York Telephone Company; and New England Telephone and Telegraph Company.

[2] *Second Report and Order and Further Notice of Proposed Rulemaking*, 13 FCC Rcd 8061 (1998) ("Order").

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particularly voice messaging, Internet access, and protocol conversion. Not one party disputes these showings. Third, a broad array of parties demonstrated that allowing CPNI to be used to contact customers who have chosen to change carriers would promote price competition and customer choice by allowing customers to learn of various pricing packages from several carriers of which they were otherwise unaware.

In contrast, many long distance incumbents – while agreeing to each of these points as a general matter – argue that incumbent local exchange carriers, and the Bell companies in particular, should be singled out for restrictions that do not apply to other carriers. But the Commission already has correctly found that the CPNI provisions of the Act apply equally to all telecommunications carriers. And conspicuously absent from any of the filings by long distance incumbents is even a hint that the public would benefit from the results they espouse – as opposed to their own interest in obtaining an unfair competitive advantage. In any event, the simple fact remains that their claims are foreclosed by the express terms of the 1996 Act.

Argument

Section 222 Applies Equally to All Telecommunications Carriers

The long distance carriers again regurgitate their failed argument that Section 272's nondiscrimination provisions "trump" Section 222 and that the Bell companies therefore should be uniquely subject to additional restrictions on the use of CPNI.[3] But they provide no basis on which the Commission could reverse its finding that Section 222, as a matter of law, applies equally to all carriers. Their arguments must again be rejected.

[3] *E.g.*, AT&T, Sprint, WorldCom, and TRA.

First, as the Commission properly held, "Section 222 by its terms extends to '<u>all</u> telecommunications carriers.'" Order at ¶ 154 (emphasis added). It also held that "section 222, and not section 272, governs all carriers, including BOCs, use and protection of CPNI." *Id.* at ¶ 168. As the Commission explained, "interpreting section 272 to impose no additional obligations on the BOCs when they share CPNI with their statutory affiliates according to the requirements of section 222, as implemented in this order, most reasonably reconciles the goals of the two provisions." *Id.* at ¶ 160. The long distance incumbents provide no justification for vacating those findings, which are based on the explicit language of the act.

Second, where Congress intended a section or even a subsection to apply differentially, it said so. For example, Section 251(a) applies across-the-board to "[e]ach telecommunications carrier," but 251(b) pertains only to "[e]ach local exchange carrier," and 251(c) only to "each incumbent local exchange carrier." Sections 271 through 276 apply on their face only to the Bell companies. By contrast, Congress specified that Section 222 applies to "[e]very telecommunications carrier," 47 U.S.C. § 222(a), and, unlike Section 251, it did not limit the application of any subsection to any subset of carriers.

Third, when it enacted Section 222 to apply universally, Congress rejected the CPNI provisions of the Senate bill that would have limited the CPNI restrictions to the Bell companies. *See* Conf. Rpt. 104-458 at 203 (Jan. 31, 1996). Section 252(f) of S. 652, as passed by the Senate, was part of the special provisions that applied only to the Bell companies. In conference, the CPNI provisions were moved into a separate section and applied universally to all telecommunications carriers. The courts and this Commission have long found that rejection of a specific legislative proposal is a valid indicator of Congressional intent that can be used in interpreting the provision that was enacted. As the Supreme Court has held, "[f]ew principles of statutory interpretation are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language."[4] The long distance carriers lost that battle in 1996 in Congress, and the Commission should reject their attempt to fight it again here.

Fourth, far from "trumping" Section 222, as the long distance carriers claim, Section 272 reinforces the Commission's conclusion that Congress did not intend to single out the Bell companies for added restrictions. Specifically, Section 272(g) expressly permits the Bell companies and their long distance affiliates to engage in joint marketing, providing the public with the benefits of one-stop shopping, and makes clear that this joint marketing is not subject to the nondiscrimination provisions of Section 272(c)(1). *See* 47 U.S.C. § 272(g)(3). And the simple fact is that access to and use of CPNI regarding a customer's local service is an integral part of this permitted joint marketing. As a result, the long distance incumbents' continued attempt to read Section 272 to permit the Commission to impose additional restrictions solely on the Bell companies is flatly inconsistent with the express language and clear policy of the Act and should again be denied.[5]

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[4] *Immigration and Naturalization Service v. Cardozo-Fonseca*, 480 U.S. 421, 442-43 (1987) (internal quotes omitted). *See also, NRC v. Federal Labor Rels. Auth.*, 879 F.2d 1225 (4^{th} Cir. 1989); *Application of Bill Welch*, 3 FCC Rcd 6502, ¶ 15 (1988) ("Under well-established rules of statutory construction, the passage of this bill in this compromise form is to be taken as a rejection by Congress of the Senate proposal." (quoting H. Warner, Radio and Television Law at 548, n.32)).

[5] *See, e.g.,* BellSouth at 13-16, Ameritech at 9-11, US. WEST at 6-10, SBC at 9-17, Bell Atlantic at 2-5.

Carriers Should Be Permitted To Use CPNI to Market To Departing Customers.

As numerous parties, including Bell Atlantic, demonstrated, permitting the use of CPNI to market to customers who have chosen to switch carriers will promote competition and produce lower prices for consumers. It will allow multiple carriers to "bid" for the customer's business by offering packages of services and pricing options of which the customer may have been unaware.

In contrast, MCI and a few of its allies claim that the Bell companies alone, or all incumbent local exchange carriers, should be banned from using CPNI in these circumstances. They base their claims on the same tired arguments about Bell company dominance that MCI has used to oppose every proposal to streamline regulation of the Bell companies to meet the needs of the public.[6] Not one of these parties, however, even attempts to show how the public would benefit from being denied the increased opportunity to negotiate prices and service arrangements among carriers that the record shows comes with allowing use of CPNI to contact departing customers,[7] because clearly it would not. This is the type of customer-by-customer competition that the Commission should encourage by granting the many petitions to allow CPNI use to regain lost customers.

Moreover, when, despite the long distance incumbents' arguments, the Commission has relaxed regulation, competition has thrived and consumers have gained. Today, the demand for CPE and information services, for example, is higher than ever before. Prices for

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[6] As just a few examples, MCI has raised the same arguments for more than a decade in every one of the many iterations of Computer Inquiries II and III. More recently, it has used the same shop-worn rhetoric to oppose petitions to streamline regulation of Bell company advanced services.

[7] *See, e.g.*, AT&T at 3-5, Bell Atlantic Mobile at 14-24, AirTouch at 9-12.

information services and equipment continue to fall as new suppliers freely enter the market, belying the claims before this Commission that eliminating structural separation for the Bell companies would suppress competition. The Bell companies are just a few of the many competitors that give customers a dizzying array of choices of equipment and services. Likewise, consumers and competition will benefit from the relief requested here.

Even MCI and its allies recognize the value of using CPNI to compete for departing customers. From their own experience in contacting customers who have switched their presubscribed interexchange carrier, they recognize the benefits to consumers and to competition. They therefore ask the Commission to permit them to use CPNI for this purpose, but to deny the Bell companies the same right. *See* MCI at 15-24. *See also* Sprint at 4, Allegiance at 12. Not only would this discriminatory result deny consumers part of the benefit, but it is also foreclosed by the Act, which requires equal application of the CPNI rules to all carriers. *See* 47 U.S.C. § 222(a).[8]

All Carriers Should Be Permitted To Use CPNI From Telecommunications Services To Market and Sell Information Services and CPE.

As Bell Atlantic and a multitude of others showed, the public interest would be served by allowing carriers to use CPNI from telecommunications services to market and sell CPE and information service, without prior consent. This proposal drew nearly unanimous support.

[8] Moreover, just as allowing an interexchange carrier to contact one of its departing customers provides an early detection against interexchange service "slamming," so will allowing the incumbent local carrier to contact a departing customer help guard against local service slamming, because this illegal practice is unfortunately not confined to the interexchange market.

The one exception is MCI, which wants any relief to apply only to CMRS providers. Granting this authority to CMRS providers is unquestionably warranted and should be adopted immediately. But extending that relief to wireline carriers is fully warranted as well. As more than a dozen and a half parties showed, allowing use of CPNI to market packages of telecommunications services along with CPE and information services serves the interests and convenience of the consuming public, and that should be the paramount factor in granting their petitions.

To the extent MCI claims that more stringent CPNI rules should be applied to incumbents than to new entrants, its claim is again foreclosed by the express words of the Act, which applies the CPNI provisions to all carriers. By requiring Section 222 to apply equally to all carriers, Congress intended to avoid handicapping any class of competitors' ability to meet the public's needs, and the Commission should affirm that policy here.

Pre-existing Written CPNI Authorizations Should Be Grandfathered.

The most egregious example of championing its own interests over those of the public is the argument of MCI that customers' previously-granted authorizations to use CPNI should be nullified. MCI at 45-48. MCI claims that all customer authorizations to use CPNI should be rejected if the CPNI notice that the customers received failed to comply with all of the subsequently-adopted CPNI notice requirements in the Commission's rules, even if they met the requirements of the Act. *Id.* This would mean that the clear preference of the thousands of customers who have already approved a carrier's use of CPNI for out-of-bucket marketing would be denied. So long as the authorizations were affirmatively given (not through an "opt-out" process), either in writing or, if verbal, were recorded or verified by a third party, they should remain valid until revoked. For example, after enactment of Section 222, Bell Atlantic provided written notice to thousands of its customers of their CPNI rights and secured written release from many of those customers. It would be expensive, time-consuming, and a severe imposition on customers who have already expressed their clear preference to be forced to go through the same process to repoll customers who have freely given their affirmative CPNI authorization. Under MCI's scenario, these customers would be deprived of the one-stop shopping ability that they clearly want.[9]

Similarly, there is no reason to grant Intermedia's request to require repolling of large customers who authorized in writing the use of CPNI for information services and CPE under the Computer Inquiry III requirements. Intermedia at 14-16. The notifications in those instances followed the Commission rules then in effect, and the customers were told that their authorizations were permanent unless they chose to revoke it. Just because the Commission subsequently changed the notification requirements, there is no public interest reason to force them to go through the affirmative authorization exercise yet again.[10]

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[9] At most, the Commission should require carriers to send a follow-up notice to those customers who have already given their affirmative written or (if oral) verified authorization, providing the additional information required by the current rules and giving them the opportunity to revoke their CPNI release.

[10] Of course, it cannot be implied that customers who authorized use of CPNI just for information services or CPE have authorized use of CPNI for other out-of-bucket services. Such broader use would require additional authorization consistent with the new rules.

Conclusion

Accordingly, the Commission should reaffirm its finding that Section 222 and the Commission's CPNI rules apply equally to all carriers, as Congress specified. It should grant Bell Atlantic's reconsideration petition and those of many other parties to permit CPNI to be used for win-back and to market CPE and information services without prior consent.

Respectfully Submitted,

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July 8, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of July, 1998 a copy of the foregoing "Reply of Bell Atlantic to Oppositions" was sent by first class mail, postage prepaid, to the parties on the attached list.

Jennifer L. Hoh

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* Via hand delivery.

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